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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 216

COMMISSIONERS OF THE SINKING FUND OF THE

CITY OF LOUISVILLE,

Petitioner,

versus

A. M. ANDERSON, RECEIVER, NATIONAL BANK

OF KENTUCKY, and

NATIONAL BANK OF KENTUCKY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIR- CUT AND BRIEF IN SUP- PORT THEREOF.

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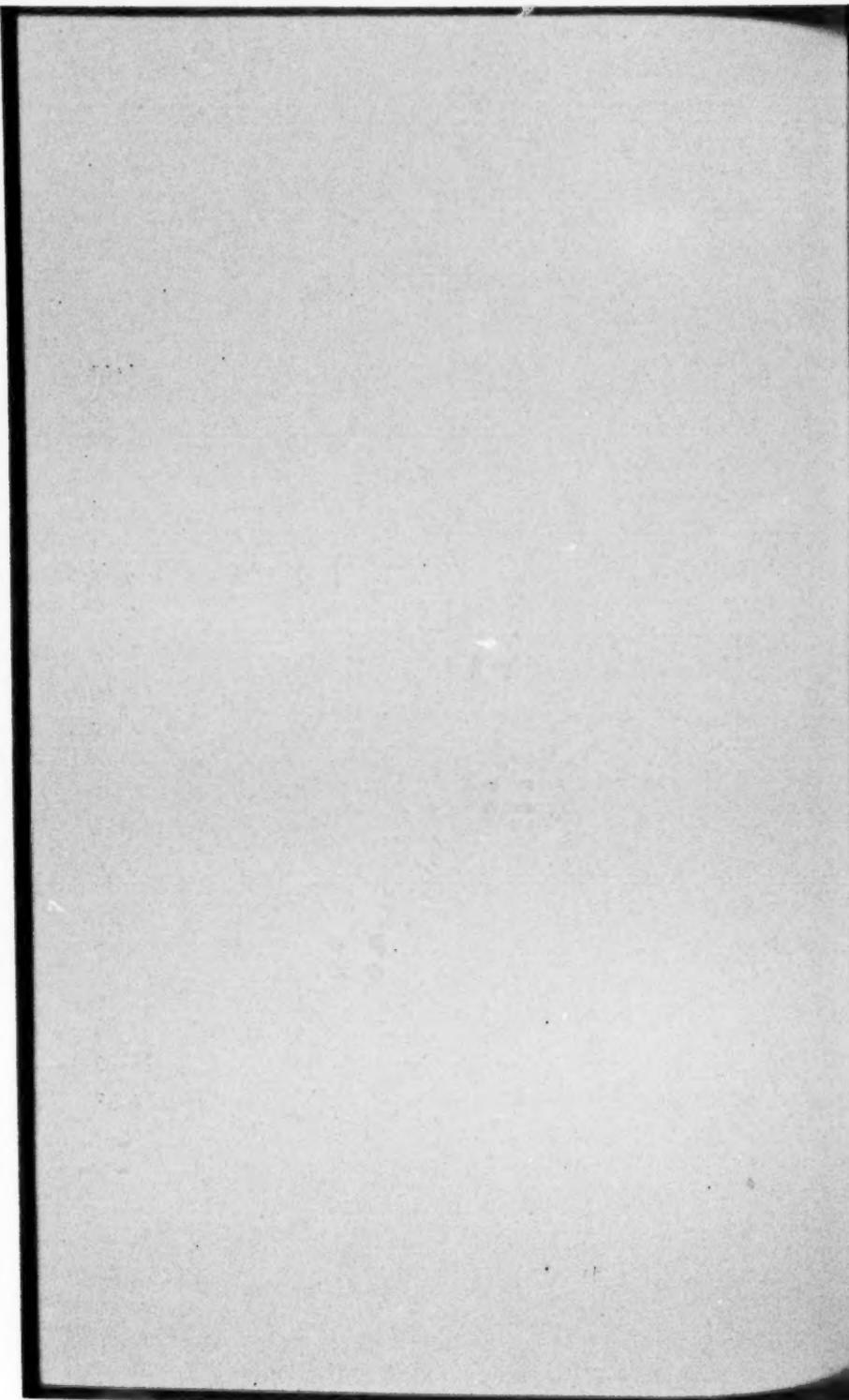
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CITY OF LOUISVILLE, - - - - - *Petitioner,*

v.

A. M. ANDERSON, RECEIVER, NATIONAL BANK OF
KENTUCKY, AND
NATIONAL BANK OF KENTUCKY, - - - - - *Respondents.*

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE SIXTH CIRCUIT AND
BRIEF THEREON.**

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Commissioners of the Sinking Fund of the City of Louisville prays that a writ of certiorari issue to review the decree entered on April 12, 1940 (Vol. II, R. 129) by and in the United States Circuit Court of Appeals for the Sixth Circuit in the above entitled cause.

OPINIONS AND DECREES BELOW.

The opinion and decree of the Circuit Court of Appeals for the Sixth Circuit reversing the District Court were rendered April 12, 1940 (Vol. II, R. 130-138, and R. 129, respectively); reported 110 F. (2d) 961.

The action was tried in the District Court for the Western District of Kentucky at Louisville, Judge Elwood Hamilton (now of the Sixth Circuit) then presiding. His opinion filed July 21, 1937, is found in the record (Vol. I, R. 72-88) and reported 20 F. S. 217.

The decree was entered in the District Court October 9, 1937, and is found in the record (Vol. I, R. 100-108).

JURISDICTION.

Jurisdiction is conferred on this Court to review this cause by writ of certiorari by Section 240a of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. 347a, 43 Stat. 938).

SHORT SUMMARY STATEMENT.

The National Bank of Kentucky, of Louisville, Kentucky, closed its doors after the close of business Saturday, November 15, 1930, insolvent, since which time its affairs have been, and are now, in liquidation, through Federal receivership.

Petitioner, Commissioners of the Sinking Fund of the City of Louisville, is a subsidiary quasi-corporation of the City of Louisville (Kentucky Statute 3010-1, Appendix, p. 31); it has but one function and that is to gather in and conserve funds of the City of Louisville for the purpose

of paying the bonded indebtedness of the City of Louisville as it becomes due and paying the interest thereon as it accrues (Kentucky Statute 3010-8, Appendix, p. 31; Kentucky Statute 3010-9, Appendix, p. 32).

When the Bank closed, Commissioners of the Sinking Fund of the City of Louisville had on deposit with the Bank, deposits aggregating \$858,952.48 (F. F., D. C., Vol. I, R. 90), segregated in several different checking accounts. One account was "Commissioners of the Sinking Fund, General Fund," \$166,275.99 (Ex. 20, Vol. II, R. 55-56); the other accounts showed allocation to specific series of bonds, for instance, "Commissioners of Sinking Fund, Sewer Bonds, issue of 1907" (Ex. 23, Vol. II, R. 61-62.) (The accounts are Ex. 14 to 23, inc., Vol. II, R. 47 to 62, all offered in evidence, Depo. Zurschmiede, Vol. II, R. 46.)

(The building up of the different accounts is explained in the evidence of Baldauf, Vol. II, R. 12.)

When the Bank closed, it owned in its own name and right, bonds of the City of Louisville of the par value of \$169,200.00 (F. F., D. C., Vol. I, R. 93), none of which bonds were then or yet due.

At the time the Bank closed, all of the City of Louisville bonds involved, with the exception of sewer (?) bonds in the face amount of \$5,200.00, were pledged to the United States Government as collateral security for deposits in the National Bank of Kentucky, of Postal Savings Funds, aggregating \$58,057.71. Such pledged bonds were subsequently redeemed by the Receiver and were then held by him free from any pledge agreement (Stipulation III, Vol. II, R. 91).

At the time the Bank closed its doors, it was carrying the bonds herein involved in its investment ledger sheets,

at a book value of \$147,910.00, excluding the value of \$5,200.00, City bonds, not pledged (Ex. 13, Vol. II, R. 46; offered Depo., Zurschmiede, R. 44-45).

Between November 17, 1930, when he took charge, and September 15, 1934, the Receiver collected interest on the bonds amounting to \$22,900.95 (Vol. I, R. 40). In the fall of 1934, by agreement, all the bonds here involved were sold, *pendente lite*, for \$173,512.25, including accrued interest (Vol. I, R. 40), without prejudice to the rights of any party to this controversy. The said sums, aggregating \$196,413.20, are being held by the Receiver pending final determination hereof (Vol. I, R. 39-45).

This cause was instituted November 13, 1931, in the District Court of the United States for the Western District of Kentucky, at Louisville, by the petitioner, in equity, to establish its right to set-off as against its deposits, the City of Louisville bonds owned by the Bank.

The District Court allowed the set-off (D. C., Concl. of Law, Vol. I, R. 96-97; Decree, Vol. I, R. 104-107). The Circuit Court of Appeals reversed the District Court and denied the set-off, hence the application for the writ herein.

THE ULTIMATE QUESTION.

Is the Commissioners of the Sinking Fund of the City of Louisville entitled to set-off, as against its deposits, the value of the City of Louisville bonds owned by the Bank, when it failed, or some part thereof?

Incidental and component questions are reflected in Specification of Errors.

SPECIFICATION OF ERRORS.

The United States Circuit Court of Appeals for the Sixth Circuit erred:

1. In rejecting the set-off.
2. In holding that the allowance of the set-off would result in an unfair distribution of the Bank's assets among its creditors.
3. In holding that as the bonds were unmatured at the date of insolvency, this prevented their use by way of setoff.
4. In holding that there was lack of mutuality and in holding that mutuality or interdependency or relation was necessary.
5. In holding that our right of set-off was predicated on the redemption of the bonds, and in failing to distinguish between the equitable right of set-off and the value thereof.
6. In finding that practically all the bonds were pledged on the date on which the District Court adjudged that the Commissioners were entitled to their surrender, and that, therefore, set-off could not be allowed.
7. In finding that when the Bank closed, its City of Louisville bonds were selling above par.
8. In assumptions not supported by the record and not made the basis of findings of fact in the District Court.
9. In assumptions not based on findings of fact in the District Court.
10. In holding that the Commissioners did not in reality assert a right to set-off.

11. In holding that what the Commissioners sought is a forced sale to them of the bonds, selling above par.
12. In finding that the Receiver reacquired the pledged bonds with money that was a part of the Bank's general assets, and in holding that the bonds bear the character of general assets.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

In rejecting the set-off the Circuit Court of Appeals has rendered a decision:

- a. In conflict with applicable decisions of this Court upon a federal question.
 1. *Scammon v. Kimball*, 92 U. S. 362.
 2. *Carr v. Hamilton*, 129 U. S. 252.
 3. *Scott v. Armstrong*, 146 U. S. 499.
 4. *North Chicago Rolling Mills Co. v. St. Louis Ore & Steel Co.*, 152 U. S. 596.
- b. In conflict with the decisions of other circuit courts of appeals on the same matter.
 1. *Sinclair Refining Co. v. Midland Oil Co.*, 55 F. (2d) 42 (C. C. A. 4).
 2. *Gray, Receiver of Monongahela National Bank v. School District of the Burrough of Brownsville*, 67 F. (2d) 141 (C. C. A. 3) (Certiorari denied 291 U. S. 660).
 3. *Jennings v. Gary State Bank*, 74 F. (2d) 100 (C. C. A. 7).
 4. *First National Bank of Indianola, Iowa, v. Malone*, 76 F. (2d) 251 (C. C. A. 8).

5. *Ellerbe v. Studebaker Corporation of America*, 21 F. (2d) 993 (C. C. A. 4).
- e. In a way probably in conflict with the decisions of the Court of Appeals of Kentucky.
Kentucky Flour Co., Assignee v. Merchants National Bank, 90 Ky. 225.
- d. In conflict with its own previous decisions creating confusion in the Circuit.
 1. *Central Appalachian Co. v. Buchanan*, 90 F. 454.
 2. *Geo. D. Harter Bank v. Inglis*, 6 F. (2d) 841 (certiorari denied 269 U. S. 576).
- e. In which it has so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision.
 1. Based upon assumptions not supported by the record and not made the basis of findings of fact in the District Court.
 2. Based upon assumptions not predicated on findings of fact in the District Court.
- f. Which involves principles, the settlement of which is important to the public.

Inasmuch as there are many national banks at this time throughout the country in receivership, and the principles herein involved may arise in various jurisdictions, the questions here urged are not only of interest and importance to the parties to this cause, but to many insolvent national banks now in receivership and their many depositors.

PRAYER FOR WRIT.

WHEREFORE, in view of the foregoing, Your Petitioner, respectfully prays that a writ of certiorari issue out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Sixth Circuit, requiring it to certify and send to this Court for its review and determination a full and complete transcript of the record and all proceedings had in this case numbered and entitled on its docket No. 7969, A. M. Anderson, Receiver of National Bank of Kentucky and National Bank of Kentucky, Appellants, v. American Bonding Company and Commissioners of the Sinking Fund of the City of Louisville, Appellees, to the end that this cause may be reviewed and determined by this Court, and that the decree of the said Circuit Court of Appeals for the Sixth Circuit be reversed on the grounds urged herein, and for such further relief as to this Court may seem proper.

COMMISSIONERS OF THE SINKING FUND
OF THE CITY OF LOUISVILLE,

Petitioner,

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